AETNA UNIVERSAL INSURANCE BHD

v.

OOI MENG SUA

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22-265-98]
8 FEBRUARY 2002

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Rules of the High Court 1980, O. 18 r. 19 - Whether application to be granted*

CIVIL PROCEDURE: *Res judicata - Issue estoppel - Claim for exact amount of damages in present suit already decided in previous proceeding - Whether party estopped from pursuing claim*

In a previous matter, the plaintiff was ordered through an *ex parte* injunction to pay the defendant damages amounting to RM287,156.39 ('the said sum'). The plaintiff applied for assessment of damages to the senior assistant registrar and subsequently to the judge in chambers for being wrongfully injuncted and sought the exact amount paid but was awarded nominal damages in the sum of RM100 instead. The plaintiff filed the present proceedings as a "protective writ" to claim the said sum.

The defendant raised *res judicata* and issue estoppel herein to strike out the plaintiff's claim under O. 18 r. 19 of the Rules of the High Court 1980.

Held:

[1] The doctrine of *res judicata* involves two kinds of estoppel, *ie*, cause of action estoppel and issue estoppel. The former arises where the cause of action in the later proceedings is identical to that in the earlier proceedings and in such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged. Issue estoppel includes barring not only a case where a particular point has been raised and specifically determined in the earlier proceedings, but where in the subsequent proceedings it is sought to raise a point which might have been but was not raised earlier. Further, once a point is distinctly put to issue and determined, and a judicial decision is final on that point, it cannot be ventilated in a fresh or new suit. (p 83 d-h)

[2] The plaintiff could have proceeded with this writ for the damages had it not sought the exact amount paid to the defendant to which the earlier court had rejected and awarded the nominal sum instead. The plaintiff had exhausted all avenues and could not now seek to preserve its right to sue under the "protective writ". (pp 83 i & 84 a-b)

[Plaintiff's writ and statement of claim struck out with costs.]

Case(s) referred to:
Lim Oh & Ors v. Allen & Gledhill [1998] 4 CLJ 667 ***(refd)***
OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - Gan Kong Aik; M/s Lee Hishammuddin
For the defendant - Surinder Singh; M/s Ong & Manecksha

Reported by M Maheswaran

JUDGMENT

RK Nathan J:
This is the defendant's application to strike out the plaintiff's writ and statement of claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980 or alternatively pursuant to the inherent jurisdiction of the court and for costs.

Facts
The defendant in this suit was the plaintiff in Penang High Court civil suit 22-163-1993 (suit 163) and he sued the present plaintiff. In suit 163 the defendant herein obtained an *ex parte* injunction on 28 May 1992. However the said *ex parte* injunction was set aside by the court on 24 October 1994 upon the present plaintiff's application. The *ex parte* injunction granted was to prevent the plaintiff herein from not paying the defendant his commission. Pursuant to the *ex parte* order the present plaintiff paid, from May 1992 to September 1994, a total sum of RM287,156.39 by way of commission.

The present plaintiff then filed an application for assessment of damages for being wrongfully injuncted and asked for this exact sum of RM287,156.39 as damages. However, after having heard arguments the learned senior assistant registrar (SAR) awarded nominal damages in the sum of RM100 to the present plaintiff in respect of the wrongful injunction. The present plaintiff then appealed against the learned SAR's decision to the judge in chambers. On 1 December 1999 the learned judge dismissed the said appeal with costs after hearing submissions. The present plaintiff has since appealed against the learned judge's decision to the Court of Appeal.

In the meantime suit 163 went on for full trial. After hearing the evidence of both parties the learned trial judge held that the defendant in this suit (the plaintiff in suit 163) was wrongly terminated as an agent and gave judgment in his favour. However, on appeal the Court of Appeal reversed the trial court's findings and held that the termination of the agency agreement was lawful. The defendant in this suit then filed a motion for leave to appeal to the Federal Court. The motion has since been denied.

In the meantime whilst the earlier suit was in progress through the various courts the plaintiff in this suit filed the present proceedings as a "protective writ". The plaintiff filed this suit on 7 May 1998 and thus extended it twice. The statement of claim was only filed on 31 May 2001. In the said statement of claim the plaintiff claimed the exact sum of RM287,156.39 which the plaintiff claimed as having paid the defendant, because of the injunction.

Findings Of The Court

Before me Surinder Singh for the defendant raised *res judicata* and issue estoppel. In *OCBC Bank (Malaysia) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534 the Court of Appeal held that the plea of *res judicata* encompasses two distinct forms of estoppel, ie, 'cause of action estoppel' and 'issue estoppel'. 'Cause of action estoppel' arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. 'Issue estoppel' represents an extension of the doctrine of *res judicata* to include a bar on the subsequent litigation not only of all decided issues whose resolution was essential to the determination of earlier proceedings but also to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Thus 'issue estoppel' has been extended to cover not only a case where a particular point has been raised and specifically determined in the earlier proceedings, but also where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier. Going further another forum of the Court of Appeal in *Lim Oh & Ors v. Allen & Gledhill* [1998] 4 CLJ 667 held that for issue estoppel to apply it is not necessary for the issue to be decided on merits. Once a point is distinctly put to issue and determined, and a judicial decision is final on that point, it cannot be ventilated in a fresh or new suit.

In this case the plaintiff was entitled to damages for the wrongful injunction granted against it. Whilst the plaintiff had a full discretion to seek damages, the plaintiff herein sought to limit its damages to recover only what it had paid the defendant. It was a willing choice emanating from the plaintiff's own free will. There was nothing to stop the plaintiff from seeking any amount of

damages but the plaintiff chose to seek the exact amount which was already decided by the earlier court which had rejected the sum of RM287,156.39 and awarded a sum of RM100 as nominal damages. The appeal to the Court of Appeal was in vain and the leave application to the Federal Court proved futile. The plaintiff had exhausted all avenues and cannot now have a second bite at the cherry through this 'protected writ' to preserve its rights to sue. The plaintiff could have proceeded with this writ to claim this sum if the plaintiff had not elected to confine its claim for damages by reclaiming the exact amount paid as commission.

I therefore struck out the plaintiff's writ and statement of claim with costs.